No. 91-100

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

RICHARD ROPER, Administrator, et al.,
on behalf of themselves and
all others similarly situated,

Petitioners,

v.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER
and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a federal statute (12 U.S.C. 85) has borrowed state law on interest rates, does a retroactive change in the Mississippi law enacted after the commencement of this action extinguish a previously accrued federal penalty arising from the prior collection of usurious interest in violation of the plain language of 12 U.S.C. 86?

(2) Does the intent of Congress derived from the plain language of 12 U.S.C. 86 of the National Bank Act fixing the penalty for collection of usurious interest at the time of collection bar application of retroactive state law amendments increasing allowable interest rates above those previously adopted under 12 U.S.C. 85?

(3) Where a state (Mississippi) and Congress have different policies for the effect of subsequent legislation on the right to recover an accrued penalty, is the Supremacy Clause of the U.S. Constitution violated by the application of Mississippi doctrine to a subsequent, retroactive Mississippi usury statute so as to defeat an accrued federal penalty arising under the National Bank Act (12 U.S.C. 86) when the application of the General Savings Statute (1 U.S.C. 109) would preserve the accrued federal penalty?

PARTIES

Petitioners (plaintiffs below):

Richard Roper, Administrator, et al., on behalf of themselves and all others similarly situated

Respondents (defendants below):

Consurve, Inc., d/b/a Bankamericard Center and Deposit Guaranty National Bank

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

BASIS FOR FEDERAL JURISDICTION BELOW 5

REASONS FOR GRANTING THE WRIT 5

A. PENALTY NOT EXTINGUISHED BY CREATING AUTHORITY REMAINS ATTACHED 5

B. MOST FAVORED LENDER DOCTRINE INAPPLICABLE WHEN PENALTY HAS ATTACHED... 6

C. STATE DOCTRINE BOWS TO CONGRESSIONAL POLICY SAVING PENALTY UNDER THE SUPREMACY CLAUSE 10

CONCLUSION 11

APPENDIX

A. Opinion Sought to be Reviewed A-1

B. Other Relevant Opinion and Judgment B-1

C. Judgment C-1

D. Other Materials D-1

TABLE OF CONTENTS – Continued

Page

1. U.S. Constitution, Article VI, Clause 2 ... D-1
2. 1 U.S.C. 109 ... D-1
3. 12 U.S.C. 85 ... D-2
4. 12 U.S.C. 86 ... D-3
5. 12 U.S.C. 1785(g) ... D-3
6. 12 U.S.C. 1831d ... D-4

TABLE OF AUTHORITIES

Page

CASES:

Deposit Guaranty National Bank v. Roper, (cert. granted) 440 U.S. 945, 55 L.Ed.2d 633 (1979) 2

Deposit Guaranty National Bank v. Roper, 445 U.S. 336, 63 L.Ed. 2d 427 (1980) 2

Ewell v. Daggs, 108 U.S. 143, 27 L.Ed. 681 (1881) 6

Farmers' & Mechanics' National Bank of Buffalo v. Dearing, 91 U.S. 29, 23 L.Ed. 196, 199 (1875) 4, 7, 8, 9, 10

First National Bank in Mena v. Nowlin, 509 F.2d 872, 876 (8th Cir. 1975) 10

McCarthy v. First National Bank of Rapid City, South Dakota, 32 S. Ct. 240, 56 L.Ed. 523 (1912) 4, 9

McCollum v. Hamilton National Bank, 303 U.S. 245, 82 L.Ed. 819 (1938) 4, 9

Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978) 2

Tiffany v. The National Bank of the State of Missouri, 18 Wall. 409, 85 U.S. 862 (1873) 3, 6, 7

CONSTITUTIONAL PROVISION:

U.S. Constitution, Article VI, Clause 2 1

STATUTES:

1 U.S.C. 109 ..... 1, 4, 10

12 U.S.C. 85 ..... 1, 4, 5, 6, 10

12 U.S.C. 86 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

12 U.S.C. 1785(g) 1, 8

12 U.S.C. 1831d 1, 8

28 U.S.C. 1254 (1) 1

28 U.S.C. 1291 5

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed in Petitioners' Appendix at Pages A-1 - 2. It is an unreported opinion.

The analysis applied by the Fifth Circuit in Petitioners' case is articulated in the opinion of the U.S. District Court which is printed in Petitioners' Appendix at pages B-1 - 19, and, though not yet reported, will be cited as ___ F. Supp. ___ (USDC, SD Ms, 1990).

The entry of judgment by the Fifth Circuit is described in the Clerk's Memorandum printed in Petitioners' Appendix at page C-1).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 24, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

	Appendix Page
U.S. Constitution, Article VI, Clause 2	D-1
1 U.S.C. 109	D-1
12 U.S.C. 85	D-2
12 U.S.C. 86	D-2
12 U.S.C. 1785(g)	D-3
12 U.S.C. 1831d	D-4

STATEMENT OF THE CASE

This action was commenced as a class action on September 17, 1971 on behalf of credit card holders of defendant bank alleging collection of usurious interest charges in violation of the penalty provisions of the National Bank Act (12 U.S.C. 86). After an adverse ruling in the District Court on class action treatment and dismissal on the theory of mootness, the Fifth Circuit reversed on both grounds in ***Roper v. Consurve, Inc.***, 578 F.2d 1106 (5th Cir. 1978). This Court granted defendants' petition for a writ of certiorari on the mootness question in ***Deposit Guaranty National Bank v. Roper***, 440 U.S. 945, 55 L.Ed.2d 633 (1979) and subsequently affirmed rejection by the Fifth Circuit of the defense of mootness in ***Deposit Guaranty National Bank v. Roper***, 445 U.S. 336, 63 L.Ed.2d 427 (1980), rehearing denied, 446 U.S. 947 (1980).

After remand the District Court ultimately certified a class under Rule 23 of the Federal Rules of Civil Procedure and after due notice identified 76,682 members of a class defined as "all holders of Bankamericard credit cards issued by the Deposit Guaranty National Bank by whom finance charges were paid during the period between September 17, 1969 and January 7, 1974."[1]

The pivotal legal issue in this action was then presented to the District Court in the form of plaintiffs' motion for a partial summary judgment, as to whether or

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[1] The District Court in its Memorandum Opinion and Order erroneously used the year "1984" instead of "1974." This clerical error was called to its attention by petitioners, but no *nunc pro tunc* correction was entered.

not Mississippi by a retroactive change in its interest rates adopted after the commencement of this action could extinguish the federal penalty which had already accrued for the collection of usurious interest under 12 U.S.C. 86.

After over four years under submission on briefs and oral arguments and almost 19 years after the commencement of this action, the District Court entered its memorandum opinion on June 15, 1990 (See Appendix B-1-19) and final judgment in favor of the defendants on June 22, 1990 (See Appendix B-20). On appeal the Fifth Circuit, without opinion, affirmed the judgment of the District Court, and further determined that this opinion should not be published, on April 24, 1991 (See Appendix A-1-2 and C-1).

The Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. There are numerous federal, civil and criminal statutes which fix penalties for violations based on conduct proscribed by adopted or assimilated state laws. The question here presented is whether, after such conduct determined by reference to state law, and the consequent accrual of action for the federal penalty, unilateral state action retroactively amending state law can extinguish or defeat the federal penalty.

Two lines of decisions of this Court have long existed in harmony. This case elevates one over the other and produces a result not contemplated by Congress and contrary to the Supremacy Clause of the U.S. Constitution. The "most favored lender doctrine" first enunciated in ***Tiffany v. The National Bank of the State of Missouri,***

18 Wall. 409, 85 U.S. 862, (1873) which treats only 12 U.S.C. 85 adopting state law fixing the rate of interest has now been expanded to allow retroactive application of state law changes to cases arising under 12 U.S.C. 86. The doctrine of ***McCarthy v. First National Bank of Rapid City, South Dakota***, 32 S. Ct. 240, 56 L.Ed. 523 (1912), followed in ***McCollum v. Hamilton National Bank***, 303 U.S. 245, 82 L.Ed. 819 (1938), preserved for Congress exclusive control of the penalty, by making the usurious transaction complete when the debtor makes actual payment, at which point the federal penalty attaches, the cause of action arises, and the two-year statute of limitations begins to run without regard to the timing or result available under state law.

The companion doctrine of ***Farmers' & Mechanics' National Bank of Buffalo v. Dearing***, 91 U.S. 29, 23 L.Ed. 196, 199 (1875), rejected state law in the realm of the penalty by showing no concern whatsoever for the prospect of penalties in the various states being less or more severe than the penalty recoverable under the federal statute for the same conduct. The opinion of the Fifth Circuit applies the most favored lender doctrine to the federal penalty (12 U.S.C. 86) for the first time, thereby undoing the long standing policy of dominance of federal law in the context of the penalty recoverable under 12 U.S.C. 86.

Petitioners argued below and will argue here that the will of Congress expressed in 12 U.S.C. 86, bolstered by the General Saving Clause (1 U.S.C. 109) is superior to the application of state doctrine to retroactive state action, and that the Fifth Circuit erred in failing to so rule.

BASIS FOR FEDERAL JURISDICTION BELOW

Jurisdiction in the District Court was grounded upon 12 U.S.C. 86 (The National Bank Act). Jurisdiction for appeal to the Fifth Circuit by the class plaintiffs from the District Court's final judgment of dismissal of the action was based on 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

In view of the fact that the Fifth Circuit, without opinion, adopted the reasons upon which the District Court based its opinion, petitioners will refer to the District Court's opinion. The National Bank Act at 12 U.S.C. 85 (Appendix D) allows a national bank to charge interest at the rate allowed by the laws of the state where the bank is located. However, at 12 U.S.C. 86 (Appendix D) where a greater rate is knowingly charged and paid the person by whom it has been paid may recover back twice the amount of interest thus paid, provided that such action is commenced within two years from the time the usurious transactions occurred. Thus, Congress itself has fixed a uniform nationwide penalty.

A. PENALTY NOT EXTINGUISHED BY CREATING AUTHORITY REMAINS ATTACHED

The District Court determined that, at the time of the transactions involving collection of interest in this case (1969-1974), the lawful rate of interest in Mississippi applicable to these transactions was 8% per annum. The District Court also determined that a 1974 amendment

retroactively increased the rate to 1 1/2% per month, thus bringing the rates actually charged and collected by the defendants within the statute as retroactively applied.

Petitioners recognize the validity of this conclusion with respect to financial institutions organized and operating solely under Mississippi law. The general rule deprives a litigant of a vested right to a penalty such as may be recoverable for a violation of statutes regulating usury *when the government authority creating such penalty* takes away the right to the penalty prior to judgment. In a decision not involving the National Bank Act and purely applicable to state law (Texas) this court applied this principle. See ***Ewell v. Daggs***, 108 U.S. 143, 27 L.Ed. 681 (1883). But, Congress, not Mississippi, created this penalty. This Court has never applied the previously stated principle of law governing penalties so as to extinguish a penalty fixed by Congress by reason of the retroactive amendment of state law on interest rates. The District Court's reliance upon ***Ewell*** to justify extinguishment of the federally created penalty by an act of a state legislature was therefore erroneous.

B. MOST FAVORED LENDER DOCTRINE INAPPLICABLE WHEN PENALTY HAS ATTACHED

Petitioners also contend that the District Court erroneously extended the "most favored lender doctrine" first established by this Court in ***Tiffany v. The National Bank of the State of Missouri***, 18 Wall. 409, 85 U.S. 862 (1873). In ***Tiffany*** the term "most favored lender" meant that the language used by Congress in 12 U.S.C. 85 did not restrict a national bank to the rates allowed to state banks where

other lenders under the laws of the state were allowed a higher rate. (85 U.S. at 863).

However, the decision in ***Tiffany*** is clearly limited by its own language to "the rates of interest allowed in Missouri *when the loans were made* by the defendants." (emphasis supplied). As national banks were then (and should now be) expected to abide by existing laws the same as other citizens, when this Court in ***Tiffany*** observed that it was intended that national banks would be given "at least equal advantages in such competition" with state lenders (85 U.S. at 863) it was clearly and logically in the context of competition with other lenders *at the time when the loans were made* and the interest was collected. Thus, if the national bank in the case *sub judice* had charged the maximum lawful rate allowed other lenders in 1969-1974 by Mississippi it would have been at no competitive disadvantage. The opinion below permits the most favored lender doctrine to be invoked by a federal lawbreaker. Congress did not intend to enact a "most favored defendant" doctrine. The most favored lender doctrine should not be available to a national bank when it is engaged in unlawful activity.

Under the most favored lender doctrine as it has existed since 1873 in federal jurisprudence there has never been competitive equality between national banks and state lenders with respect to penalties for collecting interest at rates in excess of those allowed by the state. In a result obviously mandated by the Supremacy Clause of the U.S. Constitution, this Court gave special emphasis to the exclusive nature of Congressional control of the penalty provisions under 12 U.S.C. 86 in ***Farmers' &***

Mechanics' National Bank of Buffalo v. Dearing, 91 U.S. 29, 23 L.Ed. 196, 199 (1875), with the following language, also quoted in the briefs below:

> Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur . . .
>
> In any view that can be taken of the 30th section,[2] the power to supplement by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.
>
> There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress.

(23 L.Ed. at 199)

Congress has manifested its policy for exclusive control of the penalty by adopting the same statutory structure in the case of federal credit unions at 12 U.S.C. 1785(g). (See Appendix D) and in the case of state-chartered insured depository institutions and insured branches of foreign banks at 12 U.S.C. 1831d (See Appendix D).

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[2] As noted in *Dearing, supra*, the 30th section was later divided into two sections, 12 U.S.C. 85 and 12 U.S.C. 86.

The Fifth Circuit, by adopting the reasoning of the District Court, has chosen to extend into new territory the most favored lender doctrine in a manner which intrudes upon and ignores the control which Congress retained for itself over national banks for charging and collecting usurious interest. The twofold intent of Congress is clearly demonstrated in the statutory language. While protecting national banks from unfair competition Congress also had an abiding concern in protecting the borrowing public from usury, as can be noted from the discussion of the legislative history in ***Dearing, supra,*** (23 L.Ed. at 199).

The delicate balance chosen by Congress would be destroyed at the expense of the borrowing public if this Court were to let stand the Fifth Circuit's ruling. The deterrents under state law for charging usury were not uniform in 1864 when the National Bank Act was adopted and are not uniform today. But Congress placed all national banks under a uniform deterrent. The Fifth Circuit would allow the state to retroactively lift (repeal) this deterrent – to accomplish indirectly what it is powerless to do directly. The Fifth Circuit also, by adopting the lower court's reasoning, chose to disregard the interpretation placed on 12 U.S.C. 86 by this Court in two decisions, both relied upon by petitioners in their briefs and in oral argument.

In ***McCarthy v. First National Bank of Rapid City, South Dakota,*** 223 U.S. 493, 56 L.Ed. 523 (1912), looking to the plain language of the statute this Court held that the action for the penalty accrues from the date interest is paid. In ***McCollum v. Hamilton National Bank,*** 303 U.S. 245, 247, 82 L.Ed. 819, 822 (1938), it held that the national

bank "immediately became liable" for the penalty "when the bank knowingly received the illegal interests." There is nothing in the statute of course, providing for the penalty to be extinguished upon a subsequent, retroactive change in the interest rate allowed under 12 U.S.C. 85. Had it seen fit to do so Congress could doubtless have inserted such a provision in 1864 or in the years since 1864.

By extending the most favored lender doctrine to the facts here presented the Fifth Circuit is saying that Congress intended for a national bank to be able to compete unlawfully with other state lenders by exceeding the rate allowed the others, and yet escape a penalty which is or may be more or less severe than the penalty under state law confronting its competitors. Such would undermine the balance established by Congress and recognized by this Court in ***Dearing, supra,*** which clearly insulated the penalty provisions of 12 U.S.C. 86 from application of the most favored lender doctrine.

C. STATE DOCTRINE BOWS TO CONGRESSIONAL POLICY SAVING PENALTY UNDER THE SUPREMACY CLAUSE

The Fifth Circuit, by adopting the District Court's reasoning, also ignored the Supremacy Clause of the U.S. Constitution and erroneously interposed a state court doctrine to thwart the will of Congress as expressed in the General Saving Statute (1 U.S.C. 109) (See Appendix D). By giving precedence to state court interpretation of the state's constitution and statutes under mistaken application of ***First National Bank in Mena v. Nowlin,***

509 F.2d 872, 876 (8th Cir. 1975), the decision erased a penalty theretofore attached, because of the absence, under Mississippi doctrine, of a saving clause in the 1974 retroactive law change. As petitioners argued in briefs below, Congressional policy is the exact opposite of this, and the spoken will of Congress is superior to contrary state statute and case law.

The General Saving Statute provides that the repeal of any statute shall not have the effect to release or extinguish a penalty incurred under the repealed statute unless the repealing act expressly provides. The obvious intent of Congress was to reverse the doctrine theretofore applicable, whereby the repeal of a statute without inclusion of a saving clause released or extinguished penalties not yet adjudged. Petitioners contend that the General Saving Statute clearly demonstrates the intent of Congress to retain in effect any penalty fixed by it under a statute, despite retroactive changes in the underlying law, unless Congress itself sees fit to adopt language which has the effect of extinguishing the penalty. There is nothing to suggest that Congress has delegated such authority to the state legislatures.

CONCLUSION

For the reasons assigned, petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review its opinion and judgment, and then to reverse the judgment below, enter partial summary judgment for petitioners and remand the case for further

proceedings, in accordance with the opinion and judgment of this Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1592

RICHARD ROPER, On Behalf
of Himself and all Others
Similarly Situated,

Plaintiffs-Appellants,
Cross-Appellees

versus

CONSURVE, INC., d/b/a
BANKAMERICARD CENTER,
DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,

Defendants-Appellees,
Cross-Appellants

Appeals from the United States District Court
For the Southern District of Mississippi
(No. J81 0508 (W))

(April 24, 1991)

Before SMITH and WIENER, Circuit Judges,
and SCHWARTZ*, District Judge.

PER CURIAM:**

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* District Judge of the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides that "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal

(Continued on following page)

We have concluded after analyzing the arguments advanced in counsels' briefs, hearing oral argument, and carefully reviewing the record, that the appellants' case lacks merit. Because the appellant raises no genuine issue of material fact and because this court has determined that the district court made no error of law, we affirm, without opinion, the judgment of the district court for the reasons set forth in its well-reasoned and finely crafted opinion.

AFFIRMED.

(Continued from previous page)

profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

RICHARD ROPER,
Administrator,

Plaintiffs

vs.

CONSURVE, INC., d/b/a
BankAmericard Center and
Deposit Guaranty National Bank,

Defendants

CIVIL ACTION
NO. J81-0508(W)

FILED JUN 15 1990

MEMORANDUM OPINION AND ORDER

This is a class action suit brought pursuant to 28 U.S.C. § 1331. The named plaintiffs, two "Bank-Americard" bank cardholders, sued the defendant national bank which issued the bank credit cards contending that certain charges made by defendant bank were usurious under the National Bank Act, 12 U.S.C. §§ 85 and 86. This case was appealed to the Fifth Circuit Court of Appeals, *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), and thereafter to the United States Supreme Court, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1979), on a procedural issue relative to class certification. Subsequently, in an order dated November 10, 1980, this Court certified plaintiffs' class as:

> All holders of bankamericard credit cards issued by Deposit Guaranty National Bank by whom finance charges were paid during the period between September 17, 1969, and January 7, 1984.

The parties have filed cross motions for partial summary judgment on the issue of defendants' liability under 12 U.S.C. §§ 85 and 86 of the National Bank Act, which incorporates by reference state usury laws.

Essentially, plaintiffs contend that defendants' finance charges to the consumer cardholders exceeded the eight percent (8%) per annum maximum amount of interest allowable under Mississippi law at the time. Defendants counter that under the "most favored lenders" doctrine and the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975), defendants were entitled to the interest rate Mississippi afforded its most favored lender and, thus, not in violation of the usury laws as claimed by plaintiffs.

Having thoroughly considered the briefs and arguments of the parties and being fully advised in the premises, the Court finds for the defendants for the reasons that follow.

INTEREST RATES CHARGED

On behalf of BankAmerica cardholders who paid finance charges during the period of September 17, 1969, to January 7, 1974, plaintiff cardholders brought this case against Deposit Guaranty National Bank and its wholly owned subsidiary, Consurve, Inc., d/b/a BankAmericard Center. In the normal sequence of the BankAmerica card's use, plaintiffs bought merchandise or services from merchants who had previously contracted with the bank to permit such credit purchases. The merchant would then sell the credit instrument to the bank at a discount. Thereafter, the bank billed the cardholder and charged interest

on the unpaid balance, if the balance owed was not paid within a certain time frame. *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1109 (5th Cir. 1978), affirmed 445 U.S. 326, 100 S.Ct. 1166, 64 L.Ed.2d 427, rehearing denied 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1979). The process for computation of the charges to the credit card holders was described by the Fifth Circuit as follows:

> During the period in question, the bank made a monthly service charge of 1 1/2% on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill 1 1/2% of the unpaid portion of the prior bill, which was shown as a new balance. *This is the charge contended to be usurious.* Thus, if a customer brought [sic] merchandise and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days and would then have 30 more days within which to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments, in that case, the service charge was made on unpaid installments).
>
> About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always 1 1/2% on the unpaid balance; if the effective rate was computed based on the number of days from the date the bank received

> each charge until it was paid, that effective rate would vary for each customer each month. (Emphasis added).

Roper, supra, at 1109-1110.

The controversy between the parties evolves from plaintiffs' argument that under Mississippi law the maximum rate of interest which defendants could have legally charged bank cardholders was eight percent (8%) per annum. Inasmuch as defendants charged eighteen percent (18%) per annum, plaintiffs contend that defendants' rate was usurious. In opposition, defendants claim that it was entitled to charge 1 1/2% monthly interest or finance charge (18% per annum) pursuant to the retroactive application of the 1974 amendment to the Mississippi interest statute, Miss. Code Ann. § 75-17-1, et seq., (Supp. 1975). Additionally, defendants argue that under the "most favored lender doctrine," it is entitled to charge the maximum interest rate permitted by Mississippi for the state's most favored lender.

STATE LAW

The rate of interest that a national bank may charge is ultimately a question of federal law, and the matter is governed by 12 U.S.C. § 85. *Fisher v. First National Bank of Omaha,* 548 F.2d 253 (8th Cir. 1977). By its own terms, 12 U.S.C. § 85 recites:

> § 85. Rate of interest on loans, discounts, and purchases. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the *rate*

> *allowed by the laws of the State,* Territory or District *where the bank is located, or* at a rate of *1 per centum* in excess of the discount rate on ninety-day commercial paper in effect at the *Federal reserve bank in the Federal reserve district where the bank is located, whichever may be greater, and no more, except whereby the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing* in any such State under this chapter. . . . (Emphasis added).

Thus, section 85 plainly provides that a national bank may charge interest at the rate allowed by the laws of the state in which the bank is located. *Marquette National Bank of Minneapolis v. First of Omaha Service,* 439 U.S. 299, 99 S.Ct. 540, 545, 58 L.Ed.2d 534 (1978).

A determination of the rate of interest allowed by state law has been accomplished by reference to the state court's interpretation of the state's constitution and statutes. *First National Bank in Mena v. Nowlin,* 509 F.2d 872, 876 (8th Cir. 1975), citing *Citizens National Bank v. Donnell,* 195 U.S. 369, 374, 24 S.Ct. 49, 49 L.Ed. 238 (1904). As such, 12 U.S.C. § 85 does not merely incorporate the numerical rates established by the state, but adopts and encompasses the entire body of case law interpreting the state's limitation of usury. *Nowlin,* 509 F.2d at 876.

Under § 75-17-1, et seq., Miss. Code Ann. (1972 and its supplement), each provision of the statute establishes a maximum interest rate for various types of loan or credit transactions. *Allied Chemical Corporation,* 695 F.2d 854, 857 (5th Cir. 1983). Plaintiffs rely on the *Mississippi Code* of 1942, as amended, Section 36, Laws 1966, Chapter

317, Section 1, effective from and after passage (approved June 15, 1966), which stated that:

> The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum but contracts may be made, in writing, for a payment of a rate of interest as great as eight percent (8%) per annum.

Thus, plaintiffs contend that the 8% maximum contract rate of interest governs the entire 1969 to 1974 period involved in this litigation. To the contrary, defendants rely on Paragraph (6) of § 75-17-1, Miss. Code Ann. (Supp. 1975), which establishes the maximum interest rate for extensions of credit that are incidental to retail sales. *Allied Chemical*, 695 F.2d at 857. Paragraph (6) of the 1974 amendment to the Mississippi interest rate statute, Chapter 564, Laws of 1974 (now appearing as § 75-17-1, et seq.), provides:

> (6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one half percent (1 1/2%) per month to:
>
> (a) the average daily balance of the account, exclusive of finance charge, in each billing period;
>
> (b) an amount that shall not exceed the balance of the account exclusive of the finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

> (c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b). Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of Eight Hundred Dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one quarter percent (1 1/4%) per month to that portion of the applicable balance which is in excess of Eight Hundred Dollars ($800.00) but not greater than Twelve Hundred Dollars ($1,200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds Twelve Hundred Dollars ($1,200.00). . . .

Additionally, Paragraph (9) defines finance charge in the 1974 amendment:

> (9) The term "finance charge" . . . means the amount of rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, . . . finance charges, . . . discount, . . . service charges, transaction charges, activity charges, carrying charges . . . or any other cost or expense to the debtor for services rendered or to be rendered . . . . A licensee under the Small Loan Regulatory Act . . . and the Small Loan Privilege Tax Law . . . may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

Finally, defendants argue that the retroactive application of Chapter 564, Laws of 1974 [which appeared as section 75-17-1, et seq., (Supp. 1975)] brings the interest rates charged within the provisions of the statutes so as

to defeat the contentions that the charges by defendants were usurious.

Supportive of its argument of retroactivity, defendants cite the Mississippi Supreme Court's ruling in *Cappaert v. Bierman*, 339 So.2d 1355, 1357 (Miss. 1976), that the 1974 amendment to the interest rate statute applied retroactively.

In *Cappaert*, plaintiff brought suit against a defendant on the ground that the note sued on was part of a usurious transaction. The Court stated:

> Mississippi Code Annotated section 75-17-1 (1972) established the maximum lawful interest at a rate of eight percent per annum. Section 75-17-1 was amended by Chapter 564, Laws of 1974 [now appearing as § 75-17-1, et seq.] and became effective July 1, 1974. Chapter 564 increased the legal rate of interest, for loans of this nature, to a maximum of ten percent per annum. The judgment appealed from was dated December 19, 1974. The trial judge was of the opinion that it was immaterial which law governed the transaction, because in his opinion the transaction was usurious under either law.
>
> Section 7, Chapter 564, Laws of 1974 [now appearing as Mississippi Code Annotated section 75-17-17 (Supp. 1975)], states:
>
> Loans made and credit extended prior to the effective date of this act shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby *except that finance charges contracted for or received prior to the effective date of this act shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act*

> *or other law then in effect.* Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after the effective date of this act shall conform with the provisions of this act. (Emphasis supplied in the original).
>
> We hold that the 1974 statute as written applies retroactively, and that the ten percent yield provided in that law should be applied to the present case in determining whether usury was stipulated for or received.

Cappaert, 339 So.2d at 1357.

Defendants also cite a Tennessee district court's ruling to corroborate its contention that the interest rate charged was not usurious because of the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975). *Walters v. First National Bank of Memphis*, No. 74-267-M (W.D. Tenn., June 12, 1985). In *Walters*, plaintiff, a Mississippi resident and BankAmericard bank cardholder, filed an action seeking damages pursuant to 12 U.S.C. §§ 85 and 86 alleging that interest charged was usurious under Tennessee law. Ruling that Mississippi law applied, the Tennessee Court held that the charges were not usurious under the usury statutes of either Mississippi or Tennessee. Citing § 75-17-17, Miss. Code Ann. (Supp. 1975), the Tennessee court stated:

> The disputed transactions were, according to defendant, tailored to fit the law of Mississippi at the time. Whether or not this is true is irrelevant since the retroactivity provision brings the charges here squarely within the law . . . . Finally, while plaintiff is correct in asserting that federal law controls in cases concerning national banks, 12 U.S.C. §§ 85 and 86, both incorporate by reference state usury laws. Thus, the federal rates are keyed to the state rates and must

> change as the respective states see fit, even retroactively. Federal law has long recognized that the retroactive lifting of usury limits is permissible since usury laws are generally remedial, rather than substantive. *Ewell v. Daggs*, 108 U.S. 143 (1883). The fact that 12 U.S.C. § 86 provides a penalty for the violation of a usury limit does not in any way unhinge it from state usury laws. To rule otherwise would place national banks on an unequal footing with state banks, contrary to the intent of the drafters of the National Bank Act. *See, Tiffany v. National Bank of Missouri*, 18 Wall. 409 (1874).

Walters, supra, at 5-8.

Thus, defendants' primary position is that the *Cappaert* ruling of the retroactivity of § 75-17-1, et seq., must be applied to defendant national bank so as to place it on an equal basis with all other lenders of credit in Mississippi in the spirit of the "most favored lender doctrine" espoused under 12 U.S.C. § 85 of the National Bank Act. Plaintiffs do not dispute that *Cappaert* expressly upholds the retroactive application of § 75-17-1, et seq., Miss. Code Ann. (Supp. 1975), but argues [sic] that such retroactive application is contra to the dictates of the federal savings statute, 1 U.S.C. § 109.

Section 109 of Title 1 of the United States Code provides that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under the repealed statute *unless the repealing Act expressly provides* and that the repealed statute shall be treated as still in force for a proper action or prosecuting for the enforcement of such penalty, forfeiture, or liability.

The federal Act pertaining to this case adopts not only the numerical interest rates set by state statute, but

also the entire case law of the state interpreting the state's limitations on usury. *First National Bank In Mena v. Nowlin, supra,* at page 876, 12 U.S.C. § 85. Mississippi law has expressly stated that newly enacted statutes, with no saving clause specifically included in any repealed or modified statutes extinguished any accrued right in the usury statute. *Deposit Guaranty Bank & Trust Co. v. Williams,* 9 So.2d 638 (Miss. 1942). The Mississippi Supreme Court stated:

> Many decisions in this state have affirmed the rule, which generally prevails, that the effect of a repealed statute is to abrogate the repealed statute as completely as if it had never been passed, and that a statute modifying a previous statute has the same effect as though the statute had all the while previously existed in the same language as that contained in the modified statute, unless the repealing or modifying statute contains a saving clause. (Citations omitted).
>
> The result of this rule is that every right or remedy created solely by the repealed or modified statute disappears or falls with the repealed or modified statute unless carried to final judgment before the repeal or modification, – save that no such repeal or modification shall be permitted to impair the obligation of a contract or abrogate a vested right. . . . Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the nature of regulations in the public interest. Although a right conferred solely by statute in the public interest may have accrued before the repeal or modification, it does not follow that the accrued right in such cases is a vested right, in the constitutional sense. There is no vested right in the usury laws which, therefore, may be

> repealed or changed so as to affect causes of action and defenses even in pending suits. 12 C.J., p. 974; 16 C.J.S., Constitutional Law, § 254. By the great weight of authority, the legislature may repeal a usury law and no one has any vested right to take advantage of such laws. 12 Am.Jur. p. 65.

Deposit Guaranty Bank & Trust Co. v. Williams, 9 So. 2d at 640.

Similarly, the United States Supreme Court has held that the repeal of a usury law, without a savings clause, operated retrospectively to cut off the defense for the future, even in actions on contracts previously made, thereby rejecting all arguments of deprivation of vested rights or impairment of the obligation of contract. *Ewell v. Daggs*, 108 U.S. 143, 151, 2 S.Ct. 408, 413, 27 L.Ed. 682 (1883).

Consequently, the Court finds no conflict between 1 U.S.C. § 109, a federal savings statute, and the retroactive application of Miss. Code Ann. § 75-17-1 (Supp. 1975). Section 109 of Title 1 of the United States Code is applicable to the repeal of any federal statute. This in no way imposes a restriction upon the power of a state to repeal, modify, or make retroactive its usury statute merely because 12 U.S.C. § 85 adopts the maximum rate of interest allowable by the state.

"MOST FAVORED LENDER" DOCTRINE

Derivative of 12 U.S.C. § 85 the "most favored lender" doctrine, was first established in *Tiffany v. The National Bank of the State of Missouri*, 18 Wall. 409, 85 U.S. 862, 21 L.Ed. 862 (1873). In *Tiffany*, the United States

Supreme Court held that national banks were authorized under 12 U.S.C. § 85 to charge interest at the maximum rate permitted by state law for the state's most favored lender. *Tiffany*, 18 Wall. at 411. *Tiffany* resolved the issue of whether the 30th section of the act of Congress of June 3, 1864 (presently 12 U.S.C. § 85), prohibited national banking associations in the State of Missouri from charging a greater rate of interest than eight percent (8)% which was the rate limited by the laws of the state for banks organized under its laws. *Id.* at 410. Finding that the State of Missouri allowed all persons, except banks organized under the state laws, to charge ten percent (10%) per annum as interest, the Court held that defendant Bank of Missouri charges of nine percent (9%) on loans made were not usurious. Thus, reasoning that national banks were not restricted to the rate allowed to banks of the state where a greater rate was allowed to individual lenders generally, the Court stated:

> It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly legislation . . . unfriendly legislation might make their existence in the state impossible. . . . The only mode of guarding against such contingencies was that which, we think, Congress adopted. It

> was to allow national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. . . . National banks have been national favorites. . . . In harmony with this policy is the construction we think should be given to the 30th section of the Act of Congress we have been considering. It gives advantages to national banks over their state competitors. . . . The result of this is that the defendants in receiving nine percent interest upon the loans made by them have not transgressed the Act of Congress and consequently they are under no liability of the plaintiff.

Tiffany, supra, at 412-413.

It is defendants' contention that the *Tiffany* ruling, 12 U.S.C. § 85 of the National Bank Act, accorded national banks the right to charge the interest rate afforded state competitors, whether such competitors were state banks or non-bank lenders. *Norway Lanes v. Hackley Union National Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972).[1]

---

[1] The "most favored lender" status for national banks under *Tiffany* has since been incorporated into the regulations of the Comptroller of Currency. *See* 12 C.F.R. §7.7310(a) which recites:

> (a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.

In 1974, the Mississippi Legislature, pursuant to House Bill No. 819, Chapter 564, amended the state's usury statute, Miss. Code Ann. §§ 75-17-1 (Supp. 1975). The preamble to the Act recites that it is:

> AN ACT to simplify and modernize the laws governing the lending of money, usury, extending credit, and the making of credit sales; to protect consumers against unfair practices by suppliers of credit and to provide rate ceilings; to permit and encourage the development of sound consumer credit practices and to insure an adequate supply of credit.

Section 75-17-1 was amended to permit rates of interest in all notes, accounts, and contracts of six percent (6%) except that contracts could be made in writing for payment of finance charges as otherwise provided by the Act. Miss. Code Ann. § 75-17-1 (Supp. 1975). Section 75-17-1(2) permitted any borrower to contract for payment of a finance charge of ten percent (10%) per annum for any loan or other extension of credit made directly or indirectly to the borrower. The amendment also provides that domestic or foreign corporations and non-profit corporations organized to own, operate, or finance an educational facility could agree to pay any rate of finance charge in excess of the maximum rate provided under § 75-17-1, but not to exceed fifteen percent (15%) per annum on any contract or other obligation under which the principal balance to be repaid exceeded $2,500.00. Miss. Code Ann. § 75-17-1(2)(3) (1975 Supp.). Section 75-17-1(6) under the Act provided that *any lender or issuer of credit cards may lawfully contract and receive a finance charge from one percent (1%) to one and one half percent (1½%) per month.* For any loan or extension of credit made

by a licensee under the Small Loan Regulatory Act and Small Loan Privilege Tax Law, the Act provided that the licensee could contract for and receive finance charges from twelve percent (12%) to thirty-six percent (36%) per annum depending on balances to be repaid. § 75-17-1(7)(a)-(d). The retroactive provision of the Act provided loans made or credit extended prior to the Act's effective date, July 1, 1974, would be governed by the laws in force at the time such loans or credit were extended *except that finance charges contracted for or received prior to the Act's effective date would not be unlawful if the finance charge complied with the provisions of the Act* or other law then in effect. Chapter 564, Laws of 1974 [now appearing as section 75-17-17 (Supp. 1989)].

CONCLUSION

Inasmuch as Mississippi's usury statute is highly penal in nature, it must be strictly construed in favor of the creditor. *Allied Chemical Corp. v. McKay*, 695 F.2d 854, 857 (5th Cir. 1983). Accordingly, the court is of the opinion that the retroactive application of Mississippi's 1974 amendment to its usury statute, *Cappaert v. Bierman*, 339 So.2d 1355 (Miss. 1976), and the application of the most favored lender doctrine pursuant to the retroactive statute, *see, Tiffany*, 18 Wall. 409, entitled the defendants to lawfully charge a maximum interest rate of one and one-half percent per month on unpaid credit card balances. This determination disposes of the question of usury. However, the defendants alternatively contend, pursuant to the most favored lender doctrine and Mississippi's 1958 Small Loan Act, that a national bank could lawfully charge twelve (12) percent to thirty-six (36) percent per

annum on unpaid credit card balances. In light of the court's determination that the defendants did not engage in usurious practices, it is not necessary to dispose of this issue. However, in passing, the court has considered the recent Mississippi Supreme Court decision in *Denley v. Peoples Bank of Indianola*, 553 So.2d 494 (Miss. 1989), with regard to the defendants' contention that they were entitled to claim most favored lender status under the 1958 Small Loan Act. The Mississippi Supreme Court quoted a recent statement of Comptroller of the Currency regarding the most favored lender doctrine:

> A national bank may charge interest at the maximum rate permitted by State law to any *competing* State-chartered or licensed lending institution. If State law permits a higher interest rate on a specific class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or Morris plan bank, without being so licensed. (Citations omitted).
>
> * * *
>
> Bank and Amici misread the (most favored lender) doctrine to provide that if any lender in the state may engage in a practice regarding interest rates or finance charges, a bank covered by the doctrine may seize upon the state authority and employ it across the board even to credits in no way of the class covered by the sate enactment and notwithstanding that any state-chartered competitors are prohibited the rates.

553 So.2d at pages 503, 504.

This court is not prepared to rule that small loans and credit card charges are the same class of credits. Moreover, the plaintiffs do not assert that the defendants' alleged usury occurred in connection with small loan transactions. The court sees the 1958 Small Loan Act question as a separate issue unrelated to the allegations of credit card usury in this case.

Finally, the defendants' claim to be absolved of usury pursuant to the combined mandates of the time-price doctrine and the most favored lender doctrine. A solidly embedded principle of Mississippi law, the time-price doctrine has been explained by the Mississippi Supreme Court as follows:

> Where property is sold on credit, the fact that the difference between the credit price and the cash price exceeds the percentage permitted by the usury laws will not render a transaction usurious if the parties acted in good faith. A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cost price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties but not to the courts, barring evidence of bad faith. If the parties have acted in good faith, such a transaction is not a loan, and not usurious.

The Court is of the opinion that the time-price differential or the time-price doctrine is inapplicable to the case *sub judice*. A review of Mississippi case law sustaining the doctrine reveals that the doctrine has exclusively been applied to installment sales contracts for a fixed term of repayment. The differential between the cash price quoted to a consumer and the credit price selected by the

consumer was not considered interest by the Mississippi Supreme Court. *Mullins v. Merchandise Sales Company*, 192 So.2d 700, 704 (Miss. 1966); *Bryant v. Securities Investment Company*, 102 So.2d 701, 702 (Miss. 1958).

Thus, the court finds that the 1974 amendment to Miss. Code Ann. § 75-17-1, *et seq.*, applies retroactively to preclude the plaintiffs' usury claims. The court further finds that the time-price doctrine does not apply to the circumstances of this case.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion of the plaintiffs for partial summary judgment is hereby denied, and the motion of the defendants for summary judgment is hereby granted in accordance with this opinion. A separate judgment shall be entered in accordance with the local rules.

SO ORDERED, this, the 15th day of June, 1990.

/s/ Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Civil Action No. J81-0508
Memorandum Opinion and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

RICHARD ROPER,
Administrator, et al on
behalf of themselves and
all others similarly situated

Plaintiffs

vs.

CONSURVE, INC., d/b/a
BankAmericard Center and
Deposit Guaranty National
Bank,

Defendants

CIVIL ACTION
NO. J81-0508(W)

FILED
JUN 22 1990

JUDGMENT

Plaintiffs and Defendants, having each filed Motions for Summary Judgments herein, and the Court having considered the same and expressed its opinion in the Memorandum Opinion and Order filed herein on June 15, 1990.

IT IS THEREFORE ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment be and hereby is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment be and hereby is granted in accordance with the Opinion and Order entered herein on June 15, 1990.

Summary Judgment is hereby entered in favor of the Defendants, and this cause should be, and hereby is,

finally dismissed, with prejudice to and costs against the Plaintiffs.

SO ORDERED AND ADJUDGED this the 21st day of *June*, 1990.

/s/ Henry T. Wingate
HENRY T. WINGATE,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 24, 1991

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 90-1592 – Roper, etc. v. Consurve, Inc., d/b/a Bank-Americard Center, etc.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that plaintiffs-appellants, cross-appellees pay to defendants-appellees, cross appellants the costs on appeal to be taxed by the Clerk of this Court.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: /s/ Rhonda Flowers
Deputy Clerk

Enclosure
Mr. Robert P. Dunniston
Mr. Frederick G. Helmsing ✓
Mr. Champ Lyons, Jr. ✓
Mr. W. Robert Wilson, Jr.
Mr. Vardaman S. Dunn
Mr. William F. Goodman, Jr.

U.S. CONSTITUTION, ARTICLE VI CLAUSE 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

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1 U.S.C. 109

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

---

12 U.S.C. 85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place

of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. 86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. 1785(g)

(g) interest rates

(1) If the applicable rate prescribed in this subsection exceeds the rate an insured credit union would be permitted to charge in the absence of this subsection, such credit union may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this subsection, take, receive, reserve, and charge on any loan, interest at a rate of not more than 1 per

centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such insured credit union is located or at the rate allowed by the laws of the State, territory, or district where such credit union is located, whichever may be greater.

(2) If the rate prescribed in paragraph (1) exceeds the rate such credit union would be permitted to charge in the absence of this subsection, and such State fixed rate is thereby preempted by the rate described in paragraph (1), the taking, receiving, reserving, or charging a greater rate than is allowed by paragraph (1), when knowingly done, shall be deemed a forfeiture of the entire interest which the loan carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover, in a civil action commended in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to or twice the amount of interest paid from the credit union taking or receiving such interest.

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12 U.S.C. 1831d

(a) Interest rates

In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank

or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

(b) Interest overcharge; forfeiture; interest payment recovery

If the rate prescribed in subsection (a) of this section exceeds the rate such State bank or such insured branch of a foreign bank would be permitted to charge in the absence of this section, and such State fixed rate is thereby preempted by the rate described in subsection (a) of this section, the taking, receiving, reserving, or charging a greater rate of interest than is allowed by subsection (a) of this section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment, an amount equal to twice the amount of the interest paid from such State bank or such insured

branch of a foreign bank taking, receiving, reserving, or charging such interest.

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE

(2)

No. 91-100

In The

Supreme Court of the United States

October Term, 1991

RICHARD ROPER, Administrator,
et al., on behalf of themselves and
all others similarly situated,

Petitioners,

v.

CONSURVE, INC., d/b/a BANKAMERICARD
CENTER and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

Dated: August 14, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED*

1. Whether the Bank's interest charges on credit card balances in 1969 to 1974, plainly not usurious under state law, were permitted by the National Bank Act, 12 U.S.C. § 85, precluding any claim for a penalty under 12 U.S.C. § 86.

2. Whether "the rate allowed by the laws of the State" (the rate allowed national banks in 12 U.S.C. § 85) included the rate retroactively established by state law.

3. Whether borrowers have vested rights to recover a penalty for usury or inchoate rights which vest only upon judgment.

4. Whether the "most favored lender" status of national banks under 12 U.S.C. § 85 entitles a national bank to collect interest at rates allowed by a retroactive change in the state's usury laws, where all other lenders in the state are allowed to do so.

5. The general federal saving statute, 1 U.S.C. § 109, saves any penalty or liability incurred under a federal statute prior to its repeal unless the federal repealing Act expressly provides otherwise. The National Bank Act, a federal statute, allows interest to be charged at the rate allowable by the state. Does 1 U.S.C. § 109 apply to the amendment of a state usury statute? Even if so, is the application of 1 U.S.C. § 109 necessary to the decision in this case?

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* The questions posed by the petitioners are predicated upon an erroneous assertion that state action dispossessed them of an accrued or vested penalty.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs below):

Richard Roper, Administrator, et al., on behalf of themselves and all others similarly situated

Respondents (defendants below):

Consurve, Inc., d/b/a Bankamericard Center and Deposit Guaranty National Bank*

---

* Respondents provide the following information pursuant to Rule 29.1 of this Court. The parent company of Consurve, Inc. is Deposit Guaranty National Bank. The parent company of Deposit Guaranty National Bank is Deposit Guaranty Corp. Regarding subsidiaries (except wholly owned subsidiaries), Consurve, Inc. has none; Deposit Guaranty National Bank has one, G & W Life Insurance Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

ADDITIONAL STATUTES INVOLVED vi

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. THE QUESTIONS PRESENTED ARE NOT OF SUFFICIENT IMPORTANCE TO MERIT CERTIORARI REVIEW 3

B. THE FIFTH CIRCUIT'S DECISION IS NOT WRONG 4

1. Statutory Construction 5

2. The "Most Favored Lender" Doctrine 7

3. No Vested Rights in the Usury Laws 11

4. The General Federal Saving Statute 14

CONCLUSION 16

SUPPLEMENTAL APPENDIX ..... Supp. A-1

TABLE OF AUTHORITIES

Page

CASES:

Bichel Optical Laboratory v. Marquette National Bank, 336 F. Supp. 1368 (D. Minn. 1971), *aff'd.*, 487 F.2d 906 (8th Cir. 1973) 9

Cappaert v. Bierman, 339 So. 2d 1355 (Miss. 1976) 6

Deposit Guaranty Bank & Trust Co. v. Williams, 193 Miss. 432, 9 So. 2d 638 (1942) 7, 12, 14

Ewell v. Daggs, 108 U.S. 143 (1883) 11, 13, 14, 15

Farmers' & Mechanics' National Bank of Buffalo v. Dearing, 91 U.S. 29 (1875) 4, 10

First National Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975) 6

Fisher v. First National Bank of Omaha, 548 F.2d 255 (8th Cir. 1977) 9

Fisher v. The First National Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) 9

Jefferson Standard Life Insurance Co. v. Dattel, 83 F.2d 504 (5th Cir.), *cert. denied*, 299 U.S. 567 (1936) 13

Liddell v. Litton Systems, Inc., 300 So. 2d 455 (Miss. 1974) 7

McCarthy v. First National Bank of Rapid City, S.D., 223 U.S. 493 (1912) 4, 14

McCollum v. Hamilton National Bank, 303 U.S. 245 (1938) 14

Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972) 8

TABLE OF AUTHORITIES – Continued

Page

Tiffany v. The National Bank of the State of Missouri, 85 U.S. (18 Wall.) 409 (1873) 7, 8

United Missouri Bank of Kansas City v. Danforth, 394 F. Supp. 774 (D. Mo. 1975) 8

Walters v. First National Bank of Memphis, No. 74-267-M (W.D. Tenn., June 12, 1985) 7

STATUTES:

12 C.F.R. § 7.7310 (1972) 9

Miss. Code Ann. § 75-17-1 (1972 and 1975 Supp.) 5

Miss. Code Ann. § 75-17-17 (1975 Supp.) 5

Miss. Laws 1974, Ch. 564 5

1 U.S.C. § 109 ..... 2, 15

12 U.S.C. § 85 ..... 2, 5, 6, 11, 16

12 U.S.C. § 86 ..... 2, 5, 10

ADDITIONAL STATUTES INVOLVED

Supplemental
Appendix Page

Miss. Laws 1974, Ch. 564, Sections 1 and 7 . .Supp. A-1

No. 91-100

In The

Supreme Court of the United States

October Term, 1991

RICHARD ROPER, Administrator, et al., on behalf of themselves and all others similarly situated,

Petitioners,

v.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The dispositive issue in this case is whether Deposit Guaranty[1] engaged in usurious practices in 1969 to 1974 with respect to interest collected on credit card balances. It is undisputed that in 1969 to 1974, Deposit Guaranty charged 1½ percent per month on unpaid credit card

[1] Respondents are collectively referred to herein as "Deposit Guaranty" or "Bank."

balances after a 30-day interest-free period following billing. (Appendix B-3)

The procedural history of the case is found in petitioners' Statement of the Case. On cross motions for summary judgment or partial summary judgment on the issue of Deposit Guaranty's liability under 12 U.S.C. §§ 85 and 86, the United States District Court for the Southern District of Mississippi entered summary judgment in favor of Deposit Guaranty. The District Court properly viewed the issue not as whether Mississippi could extinguish a federal penalty, but whether Deposit Guaranty's interest charges were usurious under 12 U.S.C. § 85, which incorporates by reference state usury laws. (Appendix B-2, 16)

The District Court held that 12 U.S.C. § 85 incorporated Mississippi usury law including the 1974 amendment making the higher rates set forth therein apply retroactively. It is undisputed that Deposit Guaranty's charges were not usurious under the 1974 amendment. The District Court further held that federal law's incorporation of the retroactivity provision of Mississippi's usury statute was required by the "most favored lender" doctrine, where Mississippi clearly applied the retroactivity provision to other lenders. Accordingly, the interest charges in question were not usurious. The District Court rejected plaintiffs' argument that pre-1974 usury law governed national banks while the 1974 retroactive amendment to the usury law governed other lenders during 1969 – 1974. The Court also held that 1 U.S.C. § 109 (the general federal saving statute) posed no impediment to its ruling. (Appendix B-1-19)

In a *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit affirmed for the reasons set forth in the District Court opinion. (Appendix A-1-2)

Grounds other than those relied on by the District Court support judgment in favor of Deposit Guaranty. While the District Court did not find it necessary to expressly adopt such reasons, Deposit Guaranty does not intend to waive them and expressly reserves all grounds presented by it to the District Court and the Court of Appeals.

REASONS FOR DENYING THE WRIT

A. THE QUESTIONS PRESENTED ARE NOT OF SUFFICIENT IMPORTANCE TO MERIT CERTIORARI REVIEW.

The only reason offered by petitioners for granting the writ is that the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. To the contrary, while the precise question has not been addressed by this Court, its resolution depends on principles of law settled in this Court for over 100 years. Indeed, the Fifth Circuit decided not to publish its opinion pursuant to its Local Rule which precludes "publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law." (Appendix A-1)

In support of their assertion that an "important" federal question is at stake, petitioners state only that there are numerous federal statutes fixing penalties for

conduct which violates adopted or assimilated state law. This may or may not be (petitioners name none), but even assuming such, the existence of other federal statutes under which a similar question theoretically could arise does not make the question in this case important, i.e., deserving of certiorari review. The narrow question presented is not one as to which any debate is raging in the nation's courts, nor do petitioners so contend. Indeed, petitioners cite no case of any court construing the federal statute at issue in this case, or any other federal statute, in conflict with the Fifth Circuit's decision.

While petitioners do not, and could not, argue that the Fifth Circuit's decision conflicts with an applicable decision of this Court, they do argue that the opinion below conflicts with two "doctrines" announced by this Court. The holdings in the cases cited by petitioners, *McCarthy v. First National Bank of Rapid City, S.D.*, 223 U.S. 493 (1912) and *Farmers' & Mechanics' National Bank of Buffalo v. Dearing*, 91 U.S. 29 (1875), are not even applicable to the issue in this case. Petitioners' contention is really nothing more than an argument that the lower court was wrong. Accordingly, their argument regarding the alleged doctrines of the *McCarthy* and *Dearing* cases will be refuted in the following section addressing the merits.

B. THE FIFTH CIRCUIT'S DECISION IS NOT WRONG.

Far from novel or troublesome or inconsistent with existing law, the question presented is one resolved by straightforward statutory construction, resting solidly on

two principles long ago established beyond peradventure by this Court: (i) the "most favored lender" doctrine, which embodies the legislative intent behind 12 U.S.C. §§ 85 and 86, and (ii) the principle that borrowers have no vested right in usury laws. The District Court and the Fifth Circuit correctly held that Deposit Guaranty's credit card charges in 1969 to 1974 were not usurious.

1. Statutory Construction.

Since Deposit Guaranty at all relevant times was a national bank, the rate of interest it could charge was controlled by 12 U.S.C. § 85. That section authorized the rate of interest allowed by the laws of the state in which the bank is located. (Appendix D-2) The penalty statute, 12 U.S.C. § 86, is wholly dependent on Section 85 as it provides for a penalty and forfeiture if interest is charged at a rate higher than allowed by Section 85. (Appendix D-3)

"The rate allowed by the laws of the State" in 1969 to 1974 was the rate allowed under the 1974 amendment to Mississippi's usury statute, Miss. Code Ann. § 75-17-1, *et seq.*, (1972 and 1975 Supp.).[2] The 1974 amendment expressly provides that its rates apply to pre-1974 loans. (Supp. Appendix A-9-10) The Mississippi Supreme Court has expressly upheld this retroactivity provision.

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[2] Relevant portions of Chapter 564, 1974 Mississippi Laws (sometimes hereinafter referred to as the 1974 amendment to the usury statute) are attached as the Supplemental Appendix (Supp. Appendix A-1-10). Section 1 of Chapter 564 was codified as Miss. Code Ann. § 75-17-1 (1975 Supp.); Section 7 was codified as Miss. Code Ann. § 75-17-17 (1975 Supp.).

Cappaert v. Bierman, 339 So. 2d 1355 (Miss. 1976). In *Cappaert*, interest collected by an individual as lender prior to the 1974 amendment was held not usurious where it exceeded the pre-1974 rate but was within the rate allowed by the 1974 amendment. *Id.* at 1359.

Petitioners concede that the rates state banks were allowed to charge in 1969 – 1974 were the rates allowed in the 1974 amendment. As to national banks, however, they argue that the 1966 amendment to the Mississippi usury statute determined the rates that could be charged in 1969 – 1974. That is, petitioners argue without support that "the rate allowed by the laws of the State" was different for state banks as opposed to national banks.

In construing "the rate allowed by the laws of the State," the court must look to the state court's interpretation of its usury statute. *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975). As the court below found, 12 U.S.C. § 85 adopts and encompasses the entire body of case law interpreting the state's limitation of usury. (Appendix B-5) Both the express language of the Mississippi statute and the case law of Mississippi make clear that the 1974 amendment determines pre-1974 rates. *Cappaert*, 339 So. 2d at 1357. Petitioners can cite no case that remotely suggests that 12 U.S.C. § 85 should be construed to allow national banks to charge the rate allowed by the laws of the state, retroactivity provisions excepted.

In a usury case against a national bank – on all fours with this case – the District Court for the Western District of Tennessee held that 12 U.S.C. § 85 adopts Mississippi

usury law, including the retroactivity provision. Therefore, interest on credit card balances collected prior to 1974 was not usurious where it did not exceed the rate allowed by the 1974 amendment. *Walters v. First National Bank of Memphis*, No. 74-267-M (W.D. Tenn., June 12, 1985) (cited in District Court Opinion, Appendix B-9).

The federal and state law are in agreement that there can be no recovery for usury unless the words of the controlling statute plainly impose it on a strict and literal construction. *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409 (1873); *Deposit Guaranty Bank & Trust Co. v. Williams*, 193 Miss. 432, 9 So. 2d 638, 640 (1942). In Mississippi, the usury statutes, being in derogation of the common law and penal in nature, are strictly construed against the claim of usury. *Liddell v. Litton Systems, Inc.*, 300 So. 2d 455, 456 (Miss. 1974). Petitioners have failed to bring themselves strictly within the usury statute.

Straightforward statutory construction yields the inevitable result that the interest rate allowable to Deposit Guaranty on credit card balances in 1969 – 1974 was that set forth in the 1974 amendment to the Mississippi usury statute. This result is also mandated by the "most favored lender" doctrine.

2. The "Most Favored Lender" Doctrine.

Petitioners ask this Court to rule that state banks in Mississippi were allowed to charge 1½ percent per month (18 percent per annum) on credit card charges in 1969 – 1974, but national banks were only allowed to

charge 8 percent per annum during the same period. On its face, such a result would plainly favor state banks over national banks in direct contravention of the "most favored lender" doctrine. That doctrine assures a national bank of treatment equal to that afforded to the "most favored lender" under the laws of the state in which the bank is located.

Based on Section 30 of the National Bank Act (now 12 U.S.C. § 85), the "most favored lender" doctrine has its case-law genesis in *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409 (1873). In *Tiffany*, the State of Missouri allowed banks to receive 8 percent and individuals to receive 10 percent interest on loans. The Court, construing Section 30 of the National Bank Act, held that the national bank was entitled to charge the rates allowed natural persons or 10 percent, although state banks were limited to the lesser 8 percent rate. It was held that national banks were not restricted to the rates allowed state banks but could take the rates allowed to lenders generally. *Id.* at 412-13. The holding in *Tiffany* later was tagged as the "most favored lender doctrine," and the doctrine has been broadly and liberally applied in favor of national banks.

The "most favored lender" doctrine was soon to be recognized as mandating for national banks the right to take the highest rates allowable under state law to any lender of credit, including not only individuals, as in *Tiffany*, but savings and loan operations, small loan companies, and merchants selling goods on credit. *See, e.g., Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855, 862 (6th Cir. 1972) (savings and loan operations); *United Missouri Bank of Kansas City v. Danforth*, 394

F. Supp. 774, 785 (D. Mo. 1975) (small loan companies); *Fisher v. First National Bank of Omaha*, 548 F.2d 255, 261 (8th Cir. 1977) (same); *Fisher v. The First National Bank of Chicago*, 538 F.2d 1284, 1290-91 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (same).

In 1936, the Comptroller of the Currency, with the duty of regulating national banks, rendered an interpretative opinion codifying the "most favored lender" doctrine as follows:

> (a) A national bank may charge interest at the maximum rate permitted by State law to any State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rates is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state licensed small loan company or Morris plan bank, without being so licensed.
>
> (b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.

12 C.F.R. § 7.7310 (1972).

As indicated in subsection (b) of the regulation, the "most favored lender" doctrine has been applied beyond the scope of equal rates for national banks to give national banks the benefit of exceptions to the usury laws for certain borrowers. *See, e.g., Bichel Optical Laboratory v. Marquette National Bank*, 336 F. Supp. 1368, 1370 (D. Minn.

1971), *aff'd.*, 487 F.2d 906 (8th Cir. 1973) (corporate borrower excluded from usury laws).

Despite the obvious discrimination which would exist against national banks if Mississippi state banks were permitted to charge higher interest rates than national banks in 1969 – 1974, petitioners argue that the Fifth Circuit in this case has improperly extended the "most favored lender" doctrine by allowing a "federal lawbreaker" to invoke the doctrine. Petitioners' argument begs the question. It assumes Deposit Guaranty violated 12 U.S.C. § 85 by charging interest at a rate higher than that allowed by the state. Yet that is the very question posed to the Court – and answered in the negative by the District Court and the Fifth Circuit. The "most favored lender" doctrine requires such a result. Petitioners' logic is flawed because it fails to recognize the inchoate nature of borrowers' rights under the usury laws. Such rights are not vested, but are given by statute and may be taken away by statute. (*See* Section B.3, *infra.*).

Petitioners' reliance on *The Farmers & Mechanics' National Bank of Buffalo v. Dearing*, 91 U.S. 29 (1875) is misplaced. *Dearing* holds only that the penalty provision of the National Bank Act (now 12 U.S.C. § 86) applies to all usurious transactions, regardless of whether the transaction is violative of a rate fixed by the state or a rate fixed by the National Bank Act (when no rate is fixed by the state); accordingly, no state usury penalty applies. 91 U.S. at 33. This is in keeping with Congress' intent to impose a uniform penalty for usury. It in no way undercuts the "most favored lender" doctrine, and certainly does not suggest that a penalty "attaches" at the time of the transaction. Yes, Congress does exercise control over

the penalty for usury; but this does not in any way detract from federal law's dependence on state law to determine whether usury has occurred in the first place. *Dearing* establishes no doctrine which has any direct bearing on this case.

3. No Vested Rights in the Usury Laws.

Unable to challenge the statutory construction of 12 U.S.C. § 85 applied by the district court and the appellate court below, petitioners attempt to avoid its effect through a legal fiction – that the federal penalty "attached" at the time interest was charged, and once attached could not be undone, save by Congress.

Such a fiction ignores the firmly established principle that borrowers have no vested right to recover a penalty for usury, even though their right has accrued for statute of limitations purposes. Rather, they have an inchoate right which vests only upon judgment. It is a right given by statute, and it can be taken away by statute. It is not part of the substance or merits of the contractual obligation, but is merely a statutorily supplied remedy.

This Court applied and explained the principle in *Ewell v. Daggs*, 108 U.S. 143 (1883). The makers of a promissory note set up the defense of usury under the laws of Texas in effect at the time interest was charged and collected. Prior to judgment, however, Texas repealed all usury laws. This Court held that the borrowers had no vested rights in the usury laws in effect at the time of the transaction, and accordingly, the defense of usury failed:

> [T]he more general and deeper principle . . . is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri* . . . may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. . . .
>
> The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.

Id. at 151.

The Mississippi Supreme Court held similarly in *Deposit Guaranty Bank & Trust Co. v. Williams*, 193 Miss. 432, 9 So. 2d 638 (1942), a case involving a state bank but otherwise similar to the case at bar. Because federal law adopts state law defining usury, in this context the state bank – national bank distinction is a distinction without a difference. In *Williams*, the makers of certain promissory notes raised the defense of usury under the laws of Mississippi at the time of the transaction. Prior to judgment, Mississippi amended its usury laws with the effect that the promissory notes in question were not usurious under the amended law. The amended usury statute was not expressly retroactive, though it also contained no

"savings clause." Rejecting the defense of usury, the Court held:

> Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the nature of regulations in the public interest. Although a right conferred solely by statute in the public interest may have accrued before the repeal or modification, it does not follow that the accrued right in such cases is a vested right, in the constitutional sense. There is no vested right in the usury laws, which, therefore, may be repealed or changed so as to affect causes of action and defenses even in pending suits. . . . By the great weight of authority, the legislature may repeal a usury law and no one has any vested right to take advantage of such laws.

193 Miss. at 439, 9 So. 2d at 640. *Accord, Jefferson Standard Life Ins. Co. v. Dattel*, 83 F.2d 504, 507 (5th Cir.), *cert. denied*, 299 U.S. 567 (1936).

Petitioners' attempt to avoid the effect of *Ewell v. Daggs* by arguing that only Congress can take away a penalty it created is unpersuasive. First, it ignores federal law's adoption of state law defining usury; second, it assumes "attachment" of a federal penalty at the time interest is collected, an assumption directly conflicting with the teaching of *Ewell v. Daggs*.

Under the clearly applicable holdings of *Ewell v. Daggs*, *Deposit Guaranty Bank & Trust Co. v. Williams*, and *Jefferson Standard Life Ins. Co. v. Dattel*, petitioners in 1969 to 1974 had no vested rights in the usury laws of Mississippi. The legislature, which defined usury and created the right to a penalty for usurious contracts, redefined

usury and took away the right to a penalty for contracts no longer deemed usurious. The result is that petitioners are bound by the contracts they freely entered.

Petitioners rely on the "doctrine" of *McCarthy v. First National Bank of Rapid City, S. D.*, 223 U.S. 493 (1912). This case holds only that for statute of limitations purposes a cause of action for the usury penalty accrues on the date interest is paid. *Id.* at 499 (construing what is now 12 U.S.C. § 86). Petitioners fail to recognize the distinction between accrual of a cause of action and vesting of rights. As the Mississippi Supreme Court noted in *Deposit Guaranty Bank & Trust Co. v. Williams*, it does not follow that an accrued right is a vested right. 193 Miss. at 439, 9 So. 2d at 640. A holding that a cause of action, if any, accrues on the date interest is paid does not imply that the right is vested on that date. *Ewell v. Daggs* indeed establishes that rights under the usury laws are not then vested.

The only other case relied upon by petitioners for "attachment" of the federal penalty at the time of the transaction is *McCollum v. Hamilton National Bank*, 303 U.S. 245 (1938). Contrary to petitioners' assertion, the *McCollum* court did not hold that the bank immediately became liable for the penalty when it received interest. Rather, this statement was pure dictum. The holding of the case was that in a bankruptcy a creditor (national bank) was not entitled to have the amount of a judgment against it for usury penalty credited on its claim against the bankrupt estate. *Id.* at 247-249.

4. The General Federal Saving Statute.

As a last resort, petitioners attempt to invoke the general "catch-all" savings statute found in Title 1 of the

U. S. Code. Section 109 of Title 1 is a general act, obviously designed to avoid inadvertent retroactivity, destructive of substantive rights, by acts of Congress. It has never been applied to changes in the allowable interest rates fixed by the respective states. By its terms, it never applies if the "repealing act" does "expressly provide" for retroactive application.

As the District Court and Fifth Circuit held, Section 109 applies only to the repeal of federal statutes. (Appendix B-12) Since no federal statute was repealed or amended, Section 109 is inapplicable.

Even if it is assumed, for the sake of argument, that the 1974 amendment to the Mississippi usury statute constitutes the federal repealing statute, Section 109 does not save any usury penalty. Section 109 saves any "penalty, forfeiture, or liability" unless expressly otherwise provided in the repealing statute. The 1974 amendment to the usury statute expressly provides against a savings clause; it provides for retroactive application. Thus, application of Section 109 does not "save" any liability allegedly incurred prior to the 1974 amendment.

Petitioners' argument under Section 109 suffers from the same infirmity as its other arguments: it assumes that liability becomes "attached" or "fixed" at the time of collection of interest. Petitioners assume Deposit Guaranty became liable in 1969 – 1974, then argue that it remained liable because the 1974 amendment did not extinguish such liability, or such liability was saved by Section 109. *Ewell v. Daggs* leaves no room for such an argument: petitioners' assumption of the "attachment" of

liability is clearly erroneous. *A fortiori,* all arguments depending on this assumption must fail.

Seen in this light, petitioners' Section 109 argument is superfluous. If Deposit Guaranty is liable under 12 U.S.C. § 85, it is not necessary for Section 109 to "save" such liability; if it is not liable, there is no liability to be "saved."

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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DATED: August 14, 1991

SUPPLEMENTAL APPENDIX

CHAPTER 564

HOUSE BILL NO. 819

AN ACT to simplify and modernize the laws governing the lending of money, usury, extending credit, and the making of credit sales; to protect consumers against unfair practices by suppliers of credit and to provide rate ceilings; to permit and encourage the development of sound consumer credit practices and to insure an adequate supply of credit; to amend Sections 63-19-43, 75-17-1, 75-67-127 and 75-67-217, Mississippi Code of 1972; to repeal Sections 63-19-49, 75-18-1, 75-18-3, 75-18-5, 75-18-7, 75-18-9, 75-18-11, 75-67-117 and 75-67-125, Mississippi Code of 1972; and for related purposes.

Be it enacted by the Legislature of the State of Mississippi:

Section 1. Section 75-17-1, Mississippi Code of 1972, is amended as follows:

75-17-1. Legal rates of interest and finance charges. (1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this act or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract, or other obligation under which the principal balance to be repaid shall originally exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of

usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by a security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of Eight Hundred Dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1 1/4%) per month to that portion of the applicable balance which is in excess of Eight Hundred Dollars ($800.00) but not greater than Twelve Hundred Dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds Twelve Hundred Dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar

day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Act (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than Six Hundred Dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of Six Hundred Dollars ($600.00) but not greater than Eighteen Hundred Dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of Eighteen Hundred Dollars ($1800.00) but not greater than Forty-Five Hundred Dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of Forty-Five Hundred Dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This paragraph (7) does not limit or restrict the manner of contracting for the finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed One Thousand Dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than One Thousand Dollars ($1,000.00) but does

not exceed Two Thousand Five Hundred Dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than Two Thousand Five Hundred Dollars ($2,500.00).

(9) The term "finance charge" as used in this act means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of Section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this act, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or

otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this act shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Act (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by a lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

* * *

Section 7. Loans made and credit extended prior to the effective date of this act shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to the effective date of this act shall not be unlawful if the finance charge contracted for or

received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after the effective date of this act shall conform with the provisions of this act.

* * *

Section 9. This act shall take effect and be in force from and after July 1, 1974.

Approved: April 19, 1974.